Robert Clarke & Co., Printers.] [*March, 1894.*

SUPREME COURT OF OHIO.

The Cincinnati Inclined Plane Railway Company,
Plaintiff in Error.

No. 3,872.] *vs.*

The City of Cincinnati,
Defendant in Error.

STATEMENT OF CASE AND POINTS FOR ORAL ARGUMENT.

By E. A. FERGUSON,
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STATEMENT OF THE CASE.

This action was commenced on December 12, 1890, by Theodore Horstman, city solicitor. The object and prayer of the petition is twofold:

First. To recover car license and percentage of gross earnings, aggregating $43,000, with interest on the various items making up the aggregate, from dates specified in the petition and precipe.

Second. Enjoining the railway company, defendant below, from maintaining and operating its cars upon more than one track on Auburn street, between Mason and Vine

streets, and from maintaining its tracks or operating its cars upon any of the said tracks on Main street, Court, Walnut, or Fifth streets, and for such other relief as in equity the city, plaintiff below, may be entitled to.

The railway company was organized on the 31st of April, 1871, under the act of May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," for the purpose of constructing a railroad, the termini of which were to be in the City of Cincinnati, and the village of Avondale, in Hamilton county.

1 Swan & C. 271.

Exhibits 17 and 18 to bill of testimony; printed Record, pp. 81, 82, 83, and 84.

On February 23, 1889, the terminus of the company's road, by a vote of its stockholders, duly certified to the secretary of state, was extended from its then northern terminus at the Zoological Garden, in Avondale, to the village of Glendale, in the same county.

Exhibit 41 to bill; printed Record, pp. 140, 141, and 142.

On March 30, 1877 (74 Ohio L. 66), the legislature passed an act providing:

"That any inclined plane railway or railroad company heretofore or that may hereafter (be) organized under the act of May 1, A. D. 1852, entitled 'An act to provide for the creation and regulation of incorporated companies in the State of Ohio,' shall have power to hold, lease, or purchase, and maintain and operate, such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane; provided, that no other motive power than animals shall be used on the public highways

occupied by such street railway company without the consent of the board of public works in any city having such a board, and the common council or the public authority or company having charge or owning any other highway in which such street railroad may be laid; and provided, that no inclined plane railway or railroad company shall construct any track or tracks in any street or highway without first obtaining the written consent of a majority of the property holders on the line of such proposed track or tracks, represented by the feet front of lots abutting on the street or highway along which such track or tracks are proposed to be constructed."

In 1871, the railway company constructed, and has ever since maintained and operated, an inclined plane railway from the head of Main street to the top of the hill known as "Mount Auburn," in said city, and subsequently, by virtue of grants from the public authorities or the owners thereof, constructed or acquired the street railways described in the petition and answer, extending from Fifth and Walnut streets to the foot of the inclined plane, and from the head of the same through the village of Carthage to the County Fair Grounds.

The inclined plane was built on the private property of the company, and the permission to cross above certain streets and occupy a portion of Locust street, at the head of the plane, was sought and granted under the act of May 1, 1852, by a resolution passed by the common council of Cincinnati, on the 16th day of June, 1871, which reads as follows:

"*A Resolution*—To authorize the Cincinnati Incline Plane Company to cross Miami, Baltimore, and Dorsey streets, and to occupy so much of Guilford or Locust street, between Dorsey and Saunders streets, extended as may be necessary in constructing their railway upon the following terms and conditions:

1. The company to pay any damages for which the city may be made liable for any injury to persons or property on account of such use of the streets.

2. The said railway so to be constructed as not to obstruct the

ordinary passage along the streets, and the mode in which the work is done, to be approved by the city civil engineer, and the work to be done to the satisfaction of said engineer.

3. This grant to continue only for the term of twenty (20) years from the date of the passage hereof; provided, that this resolution shall not take effect until said company shall file a written acceptance of the same with the city clerk."

The written acceptance required by the above resolution was filed on the thirtieth day of June, 1871.

The railroads in the streets leading to or connected with the inclined plane were constructed or acquired as follows:

"Under and by virtue of an ordinance passed October 11, 1884, there was constructed and operated a street railroad route known as 'Route No. 8,' along the following streets of the City of Cincinnati: Commencing at Fifth and Walnut streets, thence along Fifth to Main, north on Main to Liberty, east on Liberty to Price, north on Price to Ringold, west on Ringold to a street now called Josephine street, thence north on Josephine to Saunders, west on Saunders to Auburn avenue, north on Auburn avenue to the north corporation line at McMillan street, returning by the same route to Court street, thence west on Court to Walnut, south on Walnut to Fifth street, the place of beginning; that that part of the route on Auburn avenue from Mason street to Vine street was a single track; that said Route No. 8 was constructed under a grant from the City of Cincinnati to Porteus B. Roberts; that the City of Cincinnati on or about August 1865, authorized the said Roberts to transfer all his rights and interest in said Route No. 8 to the 'Mt. Auburn Street Railroad Company,' a corporation existing under the laws of the State of Ohio, which transfer was accordingly made by said Roberts to said company; that said company became insolvent after the construction and operation by it of all of said Route No. 8, including its single track on Auburn avenue from Mason to Vine street; that said Route No. 8 was thereupon sold to Thomas B. Wilson, Henry G. DeForest, and Wm. Austin Goodman at master commissioner's sale, on January 2, 1873, under judicial proceedings had in case No. 25,408, in the Superior Court of Cincinnati, wherein Jared N. Post and Thomas B. Wilson were plaintiffs and Thomas A. Nesmith and the said Mt. Auburn Railroad Company and others were defendants; said deed is recorded

in Book No. 408, page 572, of the Hamilton County Land Records; that afterward, to wit, on March 4, 1873, the said Thomas B. Wilson acquired by deeds of quitclaim all the right, title, and interest of said Henry G. DeForrest and Wm. Austin Goodman in and to said Route No. 8; said deeds being recorded in Book 408 on pages 574 and 573 respectively of the Hamilton County Land Records; that afterward, to wit, on the 10th day of March, 1873, the said Thomas B. Wilson by deeds of quitclaim conveyed to Joseph S. Hill, George A. Smith, and James M. Doherty all of said 'Route No. 8,' said deed being recorded in Book 408, page 576, of the Hamilton County Land Records."

At the time of the purchase of Route No. 8, it was a single track road, with turn-outs on Main street, between Court and Liberty streets, but in the year 1873 a second additional track was laid by Smith, Hill and Doherty on Main street, between Liberty and Court streets, under an ordinance of the city council, passed November 14, 1873, entitled "an ordinance authorizing the proprietors of Route 8 street railroad to lay an additional track on Main street from Liberty street to Court street."

Exhibit 16, Record, pp. 79 and 80.

In 1875, permission was given the Cincinnati Inclined Plane Company, under the 12th section of the act of May 1, 1852, now section 3283 of Revised Statutes:

"To use and occupy for a period of thirty (30) years, with a double track, Locust street, commencing at the inclined plane, thence north to Mason street and Mason street from Locust street east to Auburn street, and Auburn street with a single track from Mason street northwardly to Vine street, and Vine (formerly Washington) street by a double track to the corporation line of the city at Avondale."

Exhibit 20, Record, p. 87.

The tracks so authorized were constructed by the company, the original track of Route No. 8, on Auburn avenue north of Mason street and its turn-outs, being taken up

and removed to its proper position, so that there was a continuous double track from the head of the inclined plane to Avondale, the north corporation line of the city.

Doherty's testimony, Record, p. 32.

For some time after the control of Route No. 8 had passed into the control of Smith, Hill, and Doherty, the cars on Route No. 8 were run as provided in the ordinance establishing Route No. 8, up Liberty street and around Prospect Hill to Auburn avenue, but the inclined plane company having in the year 1873, under the permission given it by an ordinance passed December 1, 1871, entitled "an ordinance authorizing the extension of the Cincinnati Inclined Plane Railway, from the head of Main street to Fifth street market space," constructed double tracks from the foot of its inclined plane to Liberty street, where they joined the tracks of Route 8. Smith, Hill, and Doherty abandoned that portion of Route 8, up Liberty street east of Main and around Prospect Hill to Auburn avenue, because, on account of the long and heavy grades and the slipping of the streets, it had become dangerous, and passengers preferred to take the incline plane.

Doherty's testimony, Record, pp. 33, 34; Exhibit 19, pp. 85, 86.

After the passage of said act of March 30, 1877, to wit, on June 19, 1877, said George A. Smith, Joseph S. Hill, and James M. Doherty, by an indenture, leased, upon the terms and conditions therein named, to the railway company, all and singular, the street railroad owned by them known as "Mt. Auburn Street Railroad," also known as "Route No. 8," together with all tracks, rights of way, privileges, and franchises, and all the real and leasehold

estate connected and used therewith for stables, depots, stations, or otherwise, to hold the same from July 1, 1877, for ninety-nine years, renewable thereafter forever, upon the same terms and conditions which the company held the inclined plane railway. Said lease contained a covenant that the company would operate said "Route No. 8" as a part of its own road and giving the company the privilege of purchasing said "Route No. 8" at any time during said lease. Said lease is recorded in Lease Book 57, page 550, of the Hamilton County Land Records.

The inclined plane railway company availed itself of the privilege of purchase in the years 1889 and 1890 by deeds, duly recorded in the recorder's office of Hamilton county, prior to the commencement of this action.

Exhibits 36 and 37; Record, pp. 130 and 132.

Prior to June, 1889, the cars were drawn by horses or mules.

Littell's testimony, printed Record, p. 45.

On September 24, 1885, the board of public works, under and by virtue of the act of March 30, 1877, passed a resolution consenting to the use by the defendant either of electricity, cable, or compressed air as a motive power "upon the highways in which the street railroads connected with its incline plane, and held and operated by it are laid," on condition that defendant gave bond in $25,000 to hold the city harmless from any damages to persons or property arising out of the use of such motive power, which bond was duly given and accepted.

Exhibit 40 to bill of exceptions, pages 135-6 of printed Record.

On October 10, 1888, the railway company, reciting the resolution of September 24, 1885, made application to the board of public affairs, the successors of the board of public works, stating that it had decided to use electricity as a motive power on its road, and requesting permission to erect along its lines the poles, wires, and other appliances necessary to operate its road by electricity.

Exhibit 40 to bill of exceptions, pages 135, 136, of printed Record.

On October 24, 1888, the board of public affairs, under and by virtue of the said act of March 30, 1877, and in furtherance of the grant made by the board of public works, gave the defendant permission to erect along the entire length of its road the poles, wires, and appliances necessary to operate and maintain its entire line from Fifth and Walnut streets to the Zoological Garden as an electric road, in accordance with plans and specifications of the Sprague system submitted to the board.

See Exhibit No. 41 to bill of exceptions, pages 138, 139, printed Record.

In the Sprague system of electric railways, the electricity used to operate the motors under the cars is conveyed to them by a single overhead wire suspended over the middle of the street, along the underside of which runs a trolley-wheel on a single mast attached to the car, making electric connection between the overhead wire and the motor of the car, and allowing the current to pass down through the motor and on to the track, the rails of which are connected by a copper wire to form a metallic circuit, whence some of it returns directly to the dynamo generator at the power-house and a part escapes into the earth, the

common receptacle of all unconfined electricity. In addition to the overhead trolley wire, which is supported by guide wires from iron posts erected on the curb at regular intervals, there is what is called a feed wire strung along on these posts for the purpose of keeping up the required quantity of electricity on the trolley wires.

On November 23, 1888, the railway company entered into a contract with the Sprague company for the construction of the Sprague system. Littell's testimony, printed Record, p. 46.

In December of the same year the copper-wire rail connections were made, and in the spring of 1889 the poles and wires were erected, all of this work being done under the supervision of the engineer of the board of public affairs. About the beginning of June, 1889, it put its street railways in successful operation under the Sprague system as far as the Zoological Garden. Littell's testimony, p. 52 of printed Record.

When this action was commenced, December 12, 1890, the railway company was ready and had been from August of that year, to operate its extension along the Carthage pike, under a grant of the county commissioners, made on March 23, 1889, as modified on September 7, 1889 (Exhibit 42 to bill; Record, p. 142), with the necessary appendages and appurtenances of the Sprague electric system. Littell's testimony, Record, p. 53.

The following agreement was entered into, subject to exception:

"It is agreed between counsel herein that there are two mortgages given by the Cincinnati Inclined Plane Railway Company as follows:

The first, dated January 1st, A. D. 1879, recorded in mortgage book 423, page 238, Hamilton county, Ohio, Records, to Henry Peachy and William Goodman, upon all and singular the railways,

rails, bridges and real estate and all the tolls, incomes, issues and profits to accrue from the same or any part thereof, belonging to or held by said company, and all and singular the cars and rolling-stock and also all and singular the franchises and property, real and personal, of said company, including said leased railway, together with all the rights, easements, incidents and appurtenances unto the hereby granted premises belonging or in anywise appertaining, to secure an issue of $125,000.00 of bonds due January 1, 1899.

The second, dated January 1st, A. D. 1889, recorded in mortgage book 563, page 463, Hamilton county, Ohio, Records, to the Louisville Safety Vault and Trust Company, upon all and singular the inclined plane railway of the said company, including the machinery, engines, boilers, cars, tools and fixtures connected therewith, and the real estate and right of way upon which the same are situated in the City of Cincinnati, Ohio, and also the street railway known as Route No. 'Eight' in said city, theretofore convey to said Cincinnati Inclined Plane Railway Company by lease from George A. Smith, Joseph S. Hill, and James M. Doherty, dated June 4, 1887, recorded in lease book No. 57, page 550, of Hamilton county, Ohio, Records, and all the street railroads owned or held by said company, together with the electric plant, poles, and wires and machinery connected therewith, and all cars and rolling-stock, tracks, easements, rights of way, animals, rights, privileges and franchises of said company, and all real and leasehold estates owned and used by the said company, and all other property, rights, privileges and franchises then owned or which might be thereafter acquired by said company, and all tolls, rents, income, and profits and claims and demands of every nature to be thereafter acquired by said company to secure an issue of $500,000.00 of bonds due January 1, 1914." Pages 42 and 43 of printed Record.

This cause was tried May 3, 1892, and was reserved by the judge at special term for hearing to the general term, where the following decree was entered, October 21, 1893. Printed Record, pp. 18, 19, 20.

"This cause came on for hearing as reserved from special term upon the certified bill of evidence herein, the original pleadings and papers, and was argued by counsel; on consideration whereof the court find on the issues joined for the plaintiff, and that defendant, the Cincinnati Inclined Plane Railway Company, at the time of

the commencement of this action was unlawfully maintaining and operating in the City of Cincinnati a street railroad by double track on Main street between Mulberry street and Court street; by single track on Court street between Main street and Walnut street; by single track on Walnut street between Court and Fifth street; by single track on Fifth street between Walnut and Main streets, and by single track on Main street between Fifth and Court street, together with the necessary poles, wires and other appliances for the operation of the same by electricity as a motive power; further, that at the time of the commencement of this action said defendant was unlawfully maintaining and operating in the City of Cincinnati more than one street railroad track on Auburn street between Mason and Vine streets, and thereupon defendant moved the court to set aside its findings herein and for a new trial upon the ground that said findings and the judgment of the court thereon are and each of them is contrary to the evidence and contrary to law and that the same ought to have been in favor of the defendant and against the plaintiff, which said motion the court overruled, to which ruling of the court defendant at the time excepted and presented to the court its bill of exceptions herein, which being found by the court to be true, is allowed and signed and on motion is hereby made part of the record of the case.

Wherefore it is adjudged and decreed that the defendant be and the same is hereby perpetually enjoined from maintaining any of its said tracks, poles, wires or said appliances in Main street, Court street, Walnut street or Fifth street, and from operating any of its cars over any of the said tracks and also be perpetually enjoined from maintaining and operating more than one street railroad track on Auburn street between Mason and Vine streets.

The court further finds that defendant is indebted to plaintiff for a license fee of $100 per annum for each car operated over any of the tracks of street railroad route No. 8, as described in plaintiff's petition, between the years 1877 and 1884 inclusive, and the court further finds that it was agreed by counsel for plaintiff and defendant in open court that if this court should determine that the defendant was liable for any unpaid license fees or percentage on gross earnings, as claimed in the petition, the amount of the same should be reserved for future ascertainment by a master, or otherwise, as the court should direct.

Wherefore, it is ordered, adjudged, and decreed that the cause be remanded to the Superior Court in special term for trial, for the

purpose of determining the amount in money which plaintiff is entitled to recover from defendant.

It is further ordered that the operation of this decree be and the same is hereby stayed for the period of six months from the date hereof, with liberty upon the part of defendant to apply for an extension of said time, to which order staying the operation of this decree plaintiff excepts."

PETITION IN ERROR.

(Printed Record, 144–5.)

Now comes the said The Cincinnati Inclined Plane Railway Company, and says that it was the defendant in a certain action brought in the Superior Court of Cincinnati, on the 12th day of December, 1890, by the said City of Cincinnati, as plaintiff, said case being entitled *The City of Cincinnati, plaintiff*, v. *The Cincinnati Inclined Plane Railway Company, defendant*, No. 45,202. It further says that such proceedings were thereafter had in said cause, that on the 21st day of October, 1893, the said Superior Court of Cincinnati, in general term, gave judgment in said case in favor of said City of Cincinnati and against this plaintiff in error, said case being reserved from the special term to the general term of said court.

And said The Cincinnati Inclined Plane Railway Company says that there is error in said judgment of said Superior Court of Cincinnati in general term, in this, to-wit:

1. That said judgment is contrary to the evidence.

2. Contrary to the law.

3. That the findings and judgment of said court in general term should according to the law have been in favor

of this plaintiff in error and against said defendant in error.

Wherefore, plaintiff in error prays that said judgment of said Superior Court may be reversed, and that this court enter such judgment as the court below should have entered, and that plaintiff in error be restored to all things it has lost by reason of said errors committed by said Superior Court of Cincinnati.

POINTS FOR ORAL ARGUMENT.

The principal questions in this case are as follows:

I.

What is the proper construction of the act of March 30, 1877, 74 Ohio L., p. 66, which provides—

"That any inclined plane railway or railroad company heretofore, or that may hereafter be organized under the act of May 1, 1852, entitled 'An act to provide for the creation and regulation of incorporated companies in the State of Ohio,' shall have power to hold, lease or purchase and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, *upon the same terms and conditions* on which it holds, maintains and operates its inclined plane."

1. The court below was of opinion—

"That the intention of this law was simply to invest inclined plane railway companies with the corporate power to acquire and operate street railroad routes leading to, or connected with, their inclined plane, that in the acquirement of such routes such companies stood in the same position *as other persons and other street railroad companies*, and that when such routes are acquired by such companies, they are bound by all the provisions of the original grant

by the city, and that none of the provisions of the same are abrogated by such acquirement.

"'The terms and conditions' referred to in the act of 1877 are the terms and conditions of the act of May 1, 1852 (50 & 274), relating to steam railways, and under which, as we have seen, the defendant was incorporated.

"In section 12, of that act, provision is made for the occupation of streets, by such companies, with their tracks. The section is as follows:

"'If it shall be necessary, in the location of any part of any railroad to occupy any road, street, alley or public way, or ground of any kind, or any part thereof, it shall be competent for a municipal or other corporation or public officer or public authority, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied,' etc., etc.

"It was in obedience to the requirements of this section that the resolution of the City Council in 1871 was necessary, in order to enable the Inclined Railway Company to occupy the hillside streets which ran across the line of its route; and in agreeing with the company for such occupation, the city was not restricted, except as provided in the act of 1852.

"But when the Inclined Plane Company was, by the act of 1877, invested with corporate power to acquire and operate street railroads upon the terms and conditions upon which it acquired and operated its inclined plane, it followed, of course, that it could occupy the streets of a municipality only with the consent and upon the terms and conditions imposed by such municipality as provided in section 12, of the act of 1852. But while the only restrictions placed upon the municipality and the Inclined Plane Company when they entered into an agreement for the occupation of such streets by such company, as a steam railway, were the restrictions contained in the act of 1852. Yet when the city and such company sought to make an agreement for the occupation of the streets for street railroad purposes by virtue of the new corporate power conferred on the company by the act of 1877, it necessarily followed that they were also restricted by all the laws which were in existence with reference to street railroad grants." Vol. 30 Weekly Law Bulletin, p. 325.

In another part of the opinion the court says:

"It requires but the mere reading of the act to see that it

makes no grant to the Inclined Plane Company of any street railroad franchise, but merely grants to it the power to hold, lease or purchase and maintain and operate such portion of any street railroad leading to and connected with the inclined plane as may be necessary for its convenient dispatch of its business, and that this grant of power is 'upon the same terms and conditions on which it holds, maintains and operates its inclined plane.'" Vol. 30 Weekly Law Bulletin, p. 324.

It would seem that one part of this reasoning answered the other. If, when the company acquired the right to cross, with its inclined plane, the streets on the hillside, it did so under the steam railroad law, upon the terms and conditions therein provided, it would necessarily follow from the very words of the act of March 30, 1877, it would hold and maintain the street railroads acquired under that act upon the same terms and conditions.

And the conditions of affairs, as disclosed by the record, warranted this conclusion.

The inclined plane was constructed in 1871 and put in operation March 12, 1872.

Doherty's testimony, Record, p. 34.

Under the ordinance of December 1, 1871, authorizing the extension of the railway of the company from the head of Main street to Fifth street, permission was granted it "to lay a double track from a point at or near the head of Main street on the north side of Mulberry street; thence south along Main street to Liberty street; thence west on Liberty street to Walnut street; thence south on Walnut street to Fifth street market-space; thence east on Fifth street market-space." The grant was made under the 12th section of the act of May 1, 1852, without limitation as to time.

Exhibit 19, printed Record, pp. 85, 86, and 87.

Only the double tracks from the head of Main street to Liberty were built under this grant, because the Mt. Au-

burn road, Route 8, was about to be sold, as it was in 1873, and bought by Smith, Hill and Doherty, who were the principal stockholders in the Inclined Plane Railway Company, and the tracks built by the company to Liberty street, where they joined Route 8 tracks, made it unnecessary, in order to accommodate public travel to and from Fifth street Market-space, to construct.

Doherty's testimony, Record, pp. 30 and 34.

When, therefore, the general assembly passed the act of March 30, 1877, it is not a violent presumption that its members had in view such a case as was presented by this condition of affairs.

Grants of privileges to corporations are not made for the profit of the proprietors, but for the benefit of the public.

Commonwealth v. *Temple*, 14 Gray, 76, 77.

2. All corporate franchises are derived from the state.

"Having received these corporate franchises from the state, they hold them in implied trust for the benefit of the community at large and subject to the constitutional grant of legislative power to control the exercises of those franchises in the future as the public good may require. A franchise, if granted by the state with a reservation of the right of appeal, must be regarded as a mere privilege while it is suffered to continue, and the legislature may take it away at any time; and the parties must rely for the perpetuity and integrity of the franchise granted to them solely upon the sovereign grantor. *Pratt* v. *Brown*, 3 Wis. 603; Cooley on Constitutional Limitations, 472 (6th ed.). But in the absence of such a reservation, its force and effect may be attained through the constitutional power vested in the general assembly to alter or repeal, from time to time, all general laws under which corporations are formed, and to alter, revoke or repeal all special privileges or immunities that may have been granted."

Railway Co. v. *Telegraph Ass'n*, 48 Ohio St. 390, per Dickman, J., pp. 432, 433.

And see

State v. *Gas Co.*, 18 Ohio St. 262.

Sims v. *Street R. R. Co.*, 37 Ohio St. 556.

The fourth and fifth syllabi of the last case are as follows:

"4. A street railroad corporation, which owns or has the right to construct a street railroad within a city or village, may, with the permission of the council of such city or village duly granted, extend its track beyond the termini named in the certificate of incorporation, subject to the provisions of section 2505 of the Revised Statutes, as corrected. (77 Ohio L. 42.)

5. The corporate power to make such an extension is conferred by statutes under which the company is incorporated and is acting. The ordinance granting permission to extend the track is not an act conferring corporate powers. It is merely a permit to the corporation to exercise the corporate powers conferred by general law; therefore such an ordinance is not an act conferring corporate powers, which is prohibited by article 13, section 1, of the constitution of Ohio."

These statements of law bear out the contention of the defendant below, that the ownership of the streets is in the public represented by the state, and that the legislature thereof has full control over them so far as it acts within the purposes contemplated by the dedication of the same, and that the city acts merely as the agent of the state and only by reason of its permission, and therefore whatever power the state may give to the city in that respect, may also at any time be changed or revoked by it.

3. It was intimated in the opinion by the court below, but not relied on, that the grant of permission to cross the streets named in the resolution of January, 1871, which, it was conceded, was properly passed under the twelfth section of the act of May 1, 1852, limited the time of occu-

pancy to twenty years from the date of its acceptance, June 30, 1871.

a. Conceding that this grant was so limited, it is to be said about it that the limitation as to time was repugnant to the grant, and therefore void. The company had the right to condemn under the twelfth section, and if it had resorted to that right, it must have condemned "once for all."

As was said by Brinkerhoff, C.J., in the case of *Currier* v. *M. & C. R. R. Co.*, 11 Ohio St. 231–2, "the *work*," that is, the road contemplated by the charter, is a permanent thing; the lands to be taken for it, it is evident, were designed to be taken permanently, once for all. "No such thing as a temporary appropriation of land is, in the charter, expressly mentioned, nor does it anywhere appear to have entered the mind of the legislature." This is equally true of steam railroad companies organized under the act of May 1, 1852.

b. But if the occupancy of the streets could be limited, that would not destroy the inclined plane, for that was built on the private property of the company, and the occupancy of the streets crossed consisted only of the wooden piers or abutments constructed on the inside of their curb lines to support the bridges spanning the streets. As the company owns the lands abutting on either side of these streets, all it would have to do, and what it would long since have done had it not been vexed and harassed by the present litigation and the telephone case, would be to build abutments on its own ground, supporting iron bridges of longer span, and thus improve the grade of the inclined plane.

c. It is to be noted, however, that this action was not commenced until December 12, 1890, and that the limita-

tion in the resolution of June, 1871, authorizing the crossing, did not expire until June 30, 1891, more than six months after this action was brought.

II.

The city is estopped upon the facts stated and proved in this case from having the relief granted by the decree herein.

1. "The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet, the rights and liabilities of parties, legal and equitable, as distinguished from the mode of procedure, remain the same since, as before, the adoption of the Code."

Per White, J., in *Dixon* v. *Caldwell*, 15 Ohio St. 415.

2. "Whilst municipal corporations are not, as respects public rights, within ordinary limitation statutes, still, the principle of an *estoppel in pais* is applicable in such cases, as this leaves the court to decide the question, not by mere lapse of time, but by all the circumstances of the case, and to hold the public estopped or not, as right and justice may require."

Chicago, R. I. & P. R. R. Co. v. *City of Joliet*, 79 Ill. 26.

To the same effect—

Chicago & N. W. R. R. Co. v. *The People ex rel. The City of Elgin*, 91 Ills. 251.

Spokane St. R'y Co. v. *The City of Spokane Falls*, 33 Pac. Rep. 1072.

Township of Pennbroke v. *R. R. Co.*, 14 American and English R. R. Cases, 117.

Cincinnati v. *Evans*, 5 Ohio St. 594.

And see observation on same, per Peck, in *Lane* v. *Kennedy*, 13 Ohio St. 48–49.

Dillon on Municipal Corporations, section 533, after discussing the doctrine of pleading the Statute of Limitations against a municipal corporation, in a case of this character, concludes as follows:

> "But there is no danger in recognizing the principle of an *estoppel in pais* to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require."

This action, so far as relates to the injunction prayed for, if sustainable at all, must be brought under sections 1777, 1778, 1779, of the Revised Statutes, authorizing the solicitor in certain cases to apply for a forfeiture, but in such actions the court is to make such order "as the equity and justice of the case demands," section 1779. The general rule is that equity will not enforce a forfeiture.

1 Pomeroy's Equity, 459, 460.
Oil Creek R. R. v. *A. & G. R. R.*, 59 Pa. St. 85.
Coe v. *Piqua R. R.*, 10 Ohio St. 372, 411, 412.

4. Applying these principles of law, and even admitting that as against the Mt. Auburn Street Railroad Company the city could claim a cessation of the grant under the ordinance of August 19, 1864, yet by the subsequent act of March 30, 1877 and the corporate acts of the city as averred in the answer and as shown in evidence, upon the faith of which the company has incurred large expenditures and submitted to great inconveniences, it has deprived itself of the right to interfere in any way with the company's present use of its road.

See—

1. Doherty's Testimony, p. 35.
2. Littell's, pp. 46 to 54.
3. Mortgages, *ante*, pp. 9 and 10.

5. It is also to be noticed that the council of Cincinnati (board of legislation), which, under section 2640 of the municipal code, has the care, supervision, and control of all public highways, etc., of the city, has not authorized the bringing of this action or in any way questioned the right of the company to maintain and operate its inclined plane and railroads.

6. *Quere*—Is not the maintaining in the streets the tracks under a void or expired grant a public nuisance; and, if so, is not the remedy by *quo warranto* proceedings?

See *Att'y-Gen'l* v. *Utica Ins. Co.*, 2 Johns. Chan. 371–376, 379, 380.

III.

As to the right to recover car license.

1. Contracts made with or on behalf of the city must receive the same construction and are subject to the same rules of law as contracts between natural persons.

P., C. & St. L. R. R. Co. v. *City*, 16 Weekly Law Bulletin, 368; affirmed in 24 Weekly Law Bull. 416.

Philadelphia Gas cases, 31 Penn. St. 175, 180.

"Whenever a contract in any form comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were

private persons. Both stand upon an equality before the law, and the sovereign is merged in the dealer, contractor, and suitor, etc."

See *People* v. *Stephens et al.*, per Allen, J., 71 N. Y. Reports, 550.

2. There is no privity of contract between the city and the Inclined Plane Railway Company.

The contract relied upon was made with the Mt. Auburn Street Railroad Company, which gave bond for the faithful performance of its obligations.

Exhibit 25, Record, p. 110.

There is no ground for insisting that the Cincinnati Inclined Plane Railway Company succeeded to the liability of the Mt. Auburn Company. The former did not take the property with any such *onus*. The liability vested wholly on the contract of the parties by whom it was made. It did not run with the property into the hands of those who acquired it by foreclosure. They did not assume the liability expressly or by implication. Hence, neither they, nor those claiming under them, are in any way bound. The foundation of the claim as to both is *res inter alios acta*.

Sullivan v. *Portland R. R. Co.*, 94 U. S. 806, 810–811.

And see *Morgan* v. *State of Louisiana*, 93 U. S. 217–223.

The doctrine in regard to covenants in leases to pay rent, has no application to this present case. This is a suit in equity, and even if it were at law, there is no covenant or privity of estate between the parties. The covenants that were made in relation to Route 8 were in the contract between the city and the Mt. Auburn Street Railroad Company, and the Inclined Plane Company has not become the assignee of the whole of the route.

See Doherty's testimony, pp. 33 and 34.

Lease, Exhibit 35, page 125; Exhibit 25, p. 110.

"Where a lessee assigns a part of the premises leased to a third person, for the whole period of the time of the lease, it is but an underleasing, and the lessor can sustain no action on the lease for rent against said assignee."

Fulton v *Stewart*, 2 Ohio Rep. 216, and see argument in case.

There was no covenant by the company in the lease from Smith, Hill, and Doherty by which it was to pay car license.

Exhibit 35, Record, p. 125.

3. The money claim in this case is a stale one, and that defense is not necessary to set up by the answer. A court of equity always refuses its aid to stale demands without regard to the statute of limitations.

Sullivan v. *Portland*, 94 U. S. 811–812.

Brown v. *County of Buena Vista*, 95 U. S. 157, 160–1.

Paschall v. *Hinderer*, 28 Ohio St. 580–581.

4. As to laches. No demand was ever made on Smith, Hill, and Doherty, or on the company for car license.

Doherty's testimony, Record, p. 32.

Martin v. *Gray*, 142 U. S. 236, 239.

U. S. v. *Des Moines Co.*, 142 U. S. 511, 538–9.

Hammond v. *Hopkins*, 143 U. S. 224, 250.

While laches can not be imputed to the *state*, yet when the state, or the United States, is suing as a representative of private interests, laches can be imputed to either.

Hammond v. *Hopkins*, 143 U. S. 224, 250.

IV.

The grants to lay the tracks under the ordinance of December 1, 1871 (Exhibit 19, pp. 85–6), and the ordinance of October 27, 1875 (Exhibit 20, p. 67), were made to the company under the power given in section 12 of the act of May 1, 1852, now section 3283 of the Revised Statutes, and would have been good under the street railway acts.

See *Sims* v. *Street R. R. Co.*, 37 Ohio St. 556–560, and opinion of Court.